

Date: November 7, 1995

Case No.: 94-INA-00388

In the Matter of:

ZENITH TRAVEL AGENCY,
Employer

On Behalf of:

TARLOK S. CHUGH,
Alien

Before: RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 8, 1991, Zenith Travel Agency ("Employer") filed an application for labor certification to enable Tarlok S. Chugh ("Alien") to fill the position of Travel Agent Manager (AF 26-28). The job duties for the position are:

Plans itineraries, and arranges accommodations and other travel services for customer of travel agency: converses with customer to determine destination, mode of transportation [sic], travel dates, financial considerations, and accommodations required. Plans or describes and sells itinerary package tour. Gives customer brochures and publications concerning travel and containing information, such as local customs, points of interest, and special events occurring in various locations, or foreign country regulations, such as consular requirements, rates of monetary exchange, and currency limitations. Computes cost of travel and accommodations, using calculating machine, carrier tariff books, and hotel rate books, or quotes costs of package tours. Books customer on transportation carrier and makes hotel reservations, using telephone or teletypewriter. Writes or obtains travel tickets for transportation or tour and collects payment. May specialize in foreign or domestic service, individual or group travel, specific geographical area, airplane charters, or package tours by bus. May act as wholesaler and assemble tour packages.

Solicits freight business from industrial and commercial firms and passenger-travel business from travel agencies, schools, clubs, and other organizations: calls on prospective shippers to explain advantages of using company facilities.

May specialize in soliciting freight or passenger contracts or may travel from community to community to solicit freight and passenger patronage [sic] and be designated.

Applicant must have knowledge and understanding of Asian culture and geography. Employer deals with Asian tour groups, particularly [sic] India, Pakistan, China, Hong Kong etc. etc.

The requirements for the position are an AA Degree in Management and one year of experience in the job offered.

This application was remanded to the State Office on June 3, 1993 (AF 50), to determine whether the person who interviewed U.S. applicant Victoria Walker, Ritu Chugh, is the same

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

person as the Alien or “. . . are the Chugh’s the real powers behind Zenith Travel?” A memo dated June 30, 1993 (AF 30-31), notes that the Alien is listed on a registration in EDD files as a General Partner in the Employer’s business, along with Navneet Chugh. The name Rita cannot be tied in with the Alien except if the Alien has taken an American name. The Signator of the ETA 750, Part A, Lisa Preston, does not appear to occupy the position of General Manager as listed - the author of the memo stated, “The Chugh’s appear to be using her to avoid disclosing the obvious relationship between the alien name and the owner name.”

The CO issued a Notice of Findings on July 8, 1993 (AF 19-24), proposing to deny certification on the grounds that there is no clear opening for U.S. workers and failure to post notice of job opening. The CO stated that the Alien, as a partner, exercises a considerable degree of control over the operations of the company, rendering the job not clearly open. Additionally, the CO stated that the posting of the job opportunity does not comply “at all” with the regulations at 20 C.F.R. § 656.20(g). Additionally, the CO proposed denial of the certification because the Alien is unqualified, the rejection of U.S. workers lacks specificity, insufficient recruitment effort, and because an attorney or agent of the Employer interviewed the U.S. worker. The CO found that the Alien does not meet all of the requirements of the job as set forth on the ETA 750, Part A. Moreover, from the documentation submitted, it appears that U.S. applicant Walker was rejected for other than valid, job-related reasons, and there is no evidence to support the Employer’s “alleged” efforts to contact U.S. applicant Dunn. Accordingly, the recruitment is considered untimely and incomplete. Finally, the CO found that U.S. applicant Walker was interviewed by Ritu Chugh, “the alien or alien’s attorney/agent.”

Accordingly, the Employer was notified that it had until August 12, 1993, to rebut the findings or to cure the defects noted. On August 11, 1993, the Employer requested an extension of time of 30 days to respond to the NOF (AF 17-18). On August 18, 1993, the request for time was granted (AF 16).

In its rebuttal, dated August 12, 1993 (AF 6-15), the Employer contended that the regulations at 20 C.F.R. § 656.50 are not applicable in this case as the Alien neither has an ownership interest nor ownership of stock in the Employer. Also, the Employer contended that the General Manager does the hiring and firing and has no relationship or influence by the Alien. The Employer further contended that the Alien is qualified and possesses the job requirements as listed on the ETA 750, Part A. In regard to U.S. applicants, the Employer stated that U.S. worker Walker was rejected because she was not qualified and U.S. worker Dunn was never considered for the job.

The CO issued the Final Determination on December 1, 1993 (AF 3-5), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. Part 656. Specifically, the CO found that the Employer: (1) does not have a *bona fide* job opening to which U.S. workers can be referred; (2) did not adequately post the job; (3) has not submitted any evidence to rebut the finding that the Alien is unqualified for the position; (4) has not given a valid, job-related reason for the rejection of U.S. applicant Walker; (5) has not made a good-faith effort to recruit U.S. applicant Dunn; and, (6) has not shown that U.S. applicant Walker was not interviewed by the Alien’s attorney or agent.

On January 4, 1994, the Employer requested review of the Denial of Labor Certification (AF 1). In April 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) requires that the employer show that the job has been, and is, clearly open to qualified U.S. workers; that a *bona fide* job opportunity exists. Although the words "*bona fide* job opportunity" do not appear in the regulations, this administrative interpretation has been upheld. *Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmety v. U.S. Dept. of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). The employer has the burden of proving by clear evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers, and that the employer has sought, in good faith, to fill the position with a U.S. worker. *Amger Corp.*, 87-INA-545 (Oct. 15, 1987) (*en banc*).

The Board has applied a totality of the circumstances test in determining whether there is a *bona fide* job opportunity. See *Modular Container Systems Inc.*, 89-INA-228 (July 16, 1991) (*en banc*). The factors to be examined, but not limited to, are whether the alien is in the position to control or influence the hiring decision; is related to the corporate officers, director, or owners; is one of a small number of employees; and, has identical qualifications as stated in the application. *Id.* While a family relationship between the employer and employee promotes a higher level of scrutiny, it does not, *per se*, require denial of certification. See *Paris Bakery*, 88-INA-337 (Jan. 4, 1990) (*en banc*); *Altobeli's Fine Italian Cuisine*, 90-INA-130 (Oct. 16, 1991).

Employer's Counsel asserts in rebuttal that the Alien has no ownership interest in Zenith Travel Agency, and further asserts that the Agency is a sole proprietorship owned entirely by Navreet Singh Chugh (AF 6). The Employer has also offered copies of a contract signed by Navreet Chugh as owner of Zenith Travel Agency (AF 12), and a City of Artesia Business License Tax Certificate which lists Navreet Chugh as owner of the Agency (AF 14). However, the record contains several pieces of evidence indicating that Zenith Travel Agency was formed as a general partnership in 1991, and that the Alien is a partner in the business (AF 34-35, 39-41). The record also contains evidence that Zenith Travel Agency has only one employee, Lisa Preston, who signed Part A of the application as General Manager of Zenith Travel Agency, that she also was an employee of a business named "Navreet Chugh, CPA," and that she never earned more than \$1,958.00 per quarter in six quarters (working for both businesses), an average of only \$150.00 per week (AF 30-31, 42, 47).

We give more weight to the evidence which indicates that the Alien is a partner in the business. The record reflects that the local employment service deactivated Zenith Travel Agency at the end of 1991 because all of the Employer's tax transactions were being handled by Navreet Chugh, CPA, Inc. (AF 30, 39-41). Moreover, it is highly unlikely that a *bona fide* position paying \$15.30 per hour for a Travel Agent Manager exists, when the General Manager of that business has never earned more than \$1,958.00 per quarter. In addition, the relationship between the the Alien, Tarlock Singh Chugh, and the owner, Navreet Singh Chugh, is never addressed by the Employer or Employer's Counsel. One of the rejected U.S. workers stated that she was interviewed by "Ritu Chugh." Finally, the documents presented by the Employer in

rebuttal do not establish that there are no additional partners in the business, only that Navreet Chugh assumes the title of owner for contract and City tax purposes.

Without further documentation, it appears that the Employer's hiring consideration is not independent of the Alien's influence, and no true employer-employee relationship exists, given the last names of the Alien and the Owner, the fact that at least at one time the Alien was a partner in the business, the small number of employees, the Alien's match for the qualifications of the job position, and the Employer's failure to address the relationship between the owner and the Alien, who at least at one time was a partner in the business. See *Modular Container, supra*.

Denial of Certification because no *bona fide* job opening exists to which U.S. workers can be referred was, therefore, proper. Because no *bona fide* job opening exists, it is unnecessary to address the issues of inadequate job posting, insufficient recruitment, rejection of U.S. workers for other than valid, job-related reasons, whether the Alien possesses the qualifications for the job listed on the application, and whether a U.S. applicant was interviewed by the Alien or his agent. The CO's denial of labor certification is **AFFIRMED**.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the

petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.